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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1277

RACHEL J. MEYER,
Respondent,

vs.

MISSOURI STATE HIGHWAY COMMISSION,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRUCE A. RING
Chief Counsel

JOHN H. GLADDEN
Assistant Counsel

CURTIS F. THOMPSON
Assistant Counsel

State Highway Building
Jefferson City, Missouri 65101
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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MISSOURI STATE HIGHWAY COMMISSION,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, State Highway Commission of Missouri, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on December 14, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto, pp. A1-A19. The findings and opinion of the United States District Court for the Western District of Missouri, which is unreported, appear in the Appendix, pp. A20-A30.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on December 14, 1977. This petition for certiorari was filed within ninety days of the date that the Court of Appeals entered judgment. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1), Section 2101(c), and under Supreme Court Rule 19.

QUESTIONS PRESENTED

1. May a plaintiff alleging sex discrimination in violation of 42 U.S.C. Section 2000e-2, make a prima facie case of discrimination on statistical evidence without a showing of comparative statistical figures of applications by members of a protected class in relationship to the members of the protected class hired?

2. May an appellate court change the findings of fact under the clearly erroneous doctrine, in order to achieve a contrary result to the district court judgment, when evidence exists to support the district court findings?

STATUTORY PROVISION INVOLVED

42 U.S.C. 2000e-2

UNLAWFUL EMPLOYMENT PRACTICES—
EMPLOYER PRACTICES

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any

individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice

for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206 (d) of Title 29.

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed

by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community. State, section, or other area, or in the available work force in any community, State, section, or other area. Volume 9, United States Code, pp. 10297-10299, as amended at Supplement V, 1975, United States Code, p. 3544.

STATEMENT OF THE CASE

This case involves important questions concerning what must be shown in order to make a prima facie case of sex discrimination, and the ability of an appellate court to overrule the district court judge's findings of fact as clearly erroneous. Rachel Meyer, respondent, worked full time as a toll collector on the Paseo Bridge from May 1, 1970, to September 30, 1972, when the bridge became toll free. At the closing of the toll gates on September 30, 1972, respondent became a member of a group of eighteen eligible employees who were to be given preferential treatment in hiring by the appellant. This group of eighteen employees were those full-time employees hired prior to June 1, 1970, to work on the Paseo Bridge. Of the eighteen employees who were eligible for relocation within the State Highway Commission, respondent was the only female. Sixteen of the eligible employees including respondent submitted job applications and data sheets to the Highway Commission. On respondent's job application respondent stated "day hours," and on her data sheet the

words "prefer day hours, please" appeared. Of the sixteen eligible employees who sought reemployment with the Commission all but four were interviewed for various jobs within the State Highway Commission. The position for which most interviews were held was the job of maintenanceman. Respondent was one of the four not interviewed, and she was not relocated. As a result of not being relocated respondent filed suit under 42 U.S.C. Section 2000e-2, alleging discrimination due to her sex.

The statistical evidence presented by respondent was that there were two thousand employees of the Commission serving in the Maintenance Division as maintenancemen at the time in question. The evidence further indicated that none of the individuals employed in the category of maintenanceman were female, and that during the relocation period 159 men and no women were hired as new maintenancemen. However, there was no evidence to show how many members of the protected class in issue here, that is women, filed applications for the job of maintenanceman other than respondent.

The district court found as fact that respondent was not qualified for the job of maintenanceman. This finding was based upon the restrictions on respondent's application and data sheet, and expert testimony with regard to the effect of such restrictions as they apply to the position of maintenanceman. On October 26, 1976, the district court held that respondent did not make a prima facie case in her presentation of the evidence, and further held that respondent was not qualified by reason of information included in her job application and her data sheet for the job of maintenanceman. Specifically the court found the limitation to day hours had precluded her from being qualified.

Respondent timely appealed to the Eighth Circuit Court of Appeals. The Eighth Circuit Court of Appeals reversed the district court in a two to one decision and remanded it to the District Court with directions to grant appellant back pay, attorney's fees, and costs in the District Court action, and other appropriate relief. The Court of Appeals in reversing held that respondent successfully made out the prima facie case of sex discrimination because she was qualified and was not considered for the job of maintenanceman, and that appellant failed to rebut her showing of discrimination due to her sex. Basically, the Eighth Circuit has imposed upon the State Highway Commission of Missouri the burden of refuting a claim of discrimination based upon statistical evidence when there was no evidence in the case to show how many women, other than the respondent, ever applied for this position.

REASONS FOR GRANTING WRIT

A.

The decision below conflicts with controlling opinions of this court, the Fifth Circuit, and the Eighth Circuit itself. It imposes an undue burden upon an employer to refute statistical evidence that does not afford a basis for comparison.

Involved in this case is the bedrock issue of what is required to comprise a prima facie case of discrimination against a member of a protected class based on incomplete statistical evidence.

The court below has held that the district court imposed on respondent the improper burden of showing that appellant failed to look at her application objectively.

The district court does say "we cannot conclude from the evidence presented herein that they (State Highway Commission of Missouri) *failed* to look at plaintiff's application objectively." This statement is taken out of context by the appellate court. If the decision of the district court is read as a whole, it is apparent that what the holding is saying is simply that respondent has not presented enough evidence, statistical or otherwise, to shift the burden of proof to the appellant in this case.

In determining if the district court used the proper test in arriving at its decision that respondent failed to make a prima facie case, we must look at the statistics presented. There must be a comparative measure against which the statistical evidence can be weighed to determine the validity of the statistics cited. *Pettway* v. *American Cast Iron Pipe Company*, 494 F.2d 211, 231, note 46 (5th Circuit 1974); see *Green* v. *Missouri Pacific Railroad Company*, 523 F.2d 1290, 1295 (8th Circuit 1975). In *Green* v. *Missouri Pacific Railroad Company, supra*, the 8th Circuit set out three tests by which statistical evidence could be used to prove discrimination against the protected class of people. The 8th Circuit held:

> A disproportionate racial impact may be established statistically in any of three ways. The first procedure considers whether blacks as a class (or at least blacks in specified geographical area) are excluded by the employment practice in question at a substantially higher rate than whites . . . (Citations omitted)
>
> The second procedure focuses on a comparison for a percentage of the black and white job applicants actually excluded by the employment practice or test of the particular company or governmental agency in question. . . (Citations omitted)
>
> Finally, a third procedure examines the level of employment of blacks by the company or governmental agency in comparison to the percentage of blacks in the relevant geographical area. . . (Citations omitted)

The 8th Circuit in *Green* then went on to hold

> An employment criteria must be examined for its operation on a racially exclusionary basis—thus its effect must be measured upon blacks separately and whites separately. (Citations omitted)

In applying this test to facts of the instant case it can be seen that the only evidence offered by respondent was that there were no women in the job category concerned, that of maintenanceman. There was no evidence presented concerning the number of women in proportion to the number of men within the specific geographic area,

that is Missouri, who were women excluded by any employment practices of the Missouri State Highway Commission. Neither was there any evidence offered of the number of job applications for the job of maintenanceman filed by women. Finally, there was no evidence offered for the level of employment of women within the State Highway Commission in comparison to the percentage of women in the relevant geographical area.

The real point is this: whenever sex discrimination is involved it is not enough for the court to look at the number of women in the geographic area, because it is axiomatic that the number of women within most areas of the United States is going to approximate 50 percent of the general population. In order for there to be a meaningful statistical comparison to show sex discrimination, it is necessary to show the number of applications by women for the job position in question in order to show a pattern of discrimination against women. It must be pointed out that in *International Brotherhood of Teamsters* v. *United States,* ..... U.S. ....., 97 S. Ct. 1843, (1977), it was held that the burden was on the moving party to show by preponderance of the evidence that ". . . discrimination was the (employer's) standard operating procedure—the regular rather than the unusual practice," l.c. 1855. It was further held that "evidence of long lasting engrossed disparity between the composition of a work force and that of the general population thus may be significant even though Section 703 (j) makes clear that Title VII imposes no requirement that a work force mirror the general population" l.c. 1856. It is apparent that in the instant case the court below has reversed the District Court finding that a prima facie case was not made by the respondent, even though respondent has failed to show that a pattern of practice of discrimination against women

was the standard operating procedure of the State Highway Commission. Respondent did fail in establishing such a prima facie case because there was no showing that any woman had ever applied for the job of maintenanceman other than the respondent herself. It is further pointed out that statistics in and of themselves may be meaningless unless they take note of statistics which are relevant enough to be conclusive in nature. As pointed out in *Pettway* v. *American Cast Iron Pipe Company, supra,* at 231, note 46, the statistical evidence provided must be sufficiently comparative in order to give conclusive results. The policy in question must be compared for its effect on male applicants and female applicants separately. There was no comparison in the instant case. It was simply alleged women were not hired.

In this case it is impossible to have conclusive results because the number of women that applied for the job of maintenanceman was not placed into evidence.

The Court of Appeals for the 8th Circuit has inflicted a judgment on the petitioner herein, despite the fact that the respondent has been unable to show by any evidence that petitioner was predisposed to discriminate against women, or that petitioner was discriminating against women as a standard operating procedure in refusing to hire them for the job of maintenanceman. There was no showing by the respondent that any woman other than respondent applied for the job of maintenanceman, and there was no evidence of discrimination against respondent on the basis of her sex other than those bare statistics of the number of males serving as maintenanceman.

B.

In declaring findings of fact of the District Court which were supported by substantial evidence to be clearly erroneous the decision below is in direct conflict with controlling opinion of this court.

The district court found that respondent was not qualified to be a maintenanceman because she lacked experience with equipment, and because she had stated a definite preference for day-time work. These findings of fact were supported by the employment application and data sheet of respondent and by unrebutted testimony of appellant's personnel experts, Mr. Joseph A. DeClue, and Mr. Frank Taggart. Respondent's application stated on it "day hours." It was not stated as a mere preference on the job application. On respondent's data sheet she once again reiterated her desire for day hours by stating "prefer day hours please." Based upon this language, Mr. Taggart testified that anybody with personnel background viewing both the data sheet and the job application and with an eye for hiring an individual to fill the job of maintenanceman would have eliminated from consideration a person filing an application with those preferences on it, regardless of the sex of the individual filing it. There was absolutely no evidence anywhere in the record to rebut the testimony of Mr. Taggart in this regard.

Mr. DeClue, Personnel Director for the petitioner, gave the following testimony:

> Q. If you were to receive the application of Rachel J. Meyer and the data sheet of Rachel J. Meyer, along with the performance appraisal of Rachel J. Meyer, would you recommend hiring this individual?
>
> A. No, I would not.

> Q. Why would you not consider this application for the position of maintenanceman?
>
> A. Basically for the lack of ability to . . . her background in the operation of equipment, which is basic to the job of maintenanceman.

Likewise the testimony of Frank Taggart, Petitioner's Personnel Liaison Officer, the following evidence was elicited.

> Q. Mr. Taggart, in your experience in personnel, have you ever arrived at an opinion of application or of the people who file applications with reservations in them?
>
> A. Yes, many times.
>
> Q. Do those reservations indicate anything derogatory to you regarding that particular applicant?
>
> A. This application here?
>
> Q. Any application, not just this one.
>
> A. Normally, if you have an application that has preferences, statements on it saying "won't accept certain types of work," this type of thing, it is derogatory to the fact that this may not be the type of employee you are looking for. . .
>
> Q. In your opinion in 1972, considering the labor conditions at the time, would an application with the reservations and information on it contained in Rachel J. Meyer's application have passed such a screening test as you just outlined to me?
>
> A. No, it would not.

Both Anthony J. DeClue, Respondent's Personnel Director, and Frank Taggart, Respondent's Personnel Liaison

Officer, testifying as experts in the area of personnel management stated unequivocally that respondent's job application and data sheet, when considered together, were such that such an application would have been screened out and the applicant not interviewed, regardless of the applicant's sex, on the basis of the information contained therein.

The reason that respondent's application disqualified her for maintenanceman was that all individuals employed in that position were on 24-hour emergency call. Such individuals were expected to report immediately upon contact. The emergency call was required for such varied purposes as traffic accidents, snow removal, and natural disasters. Mr. DeClue testified that in his twenty years of experience in the highway department, no person had been hired for the position of maintenanceman with a restriction on his application with regard to hours of employment.

The court below has modified the requirements for making a prima facie case of discrimination as set by this court in the landmark case, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). That case set forth four criteria for establishing a prima facie case, including the requirement that the complainant was qualified for the position the employer was trying to fill. *Green, supra,* at 802. By ignoring all the evidence with regard to the 24-hour emergency call and the evidence that no applicant, regardless of sex, was hired with restrictions as to time available to work, the court below has effectively removed the requirement of *Green, supra,* that a complainant be qualified for the job. All the evidence with regard to the time restrictions of Ms. Meyer's application was that such restrictions *disqualified* her for consideration for maintenanceman.

The court below reversed the district court findings that were adverse to respondent, based upon the clearly erroneous doctrine with the statement that "Ms. Meyer presented ample evidence establishing that she was qualified to serve as a maintenance worker." However, the court below misapplied the clearly erroneous doctrine since the only evidence concerning the effect of the time restrictions on respondent's application was that those restrictions were incompatible with the job of maintenanceman.

The court below has determined respondent is guilty of sex discrimination despite the fact that the respondent who initially had the burden of proof provided statistical evidence which offered no basis of comparison, provided no evidence of discrimination on the basis of sex other than that statistical evidence, and did not rebut the testimony of plaintiff's personnel experts that an application and data sheet containing the limitations contained in Rachel J. Meyer's would not pass a personnel screening test regardless of the sex of the applicant.

Judge Matthes in his dissent to the opinion of the court below has stated that "It is not enough that we might have found the facts differently", and then explains that the court of appeals should not substitute the findings of the trial court when there is substantial evidence to support those findings. Judge Matthes further stated that this is particularly true when "as here, the district court is experienced, capable, and even-handed."

As can be seen, there was substantial evidence in the case that respondent's job application and data sheet on the face made respondent unqualified whenever applying proper expertise to the information contained on them. This is the only evidence in the case bearing on whether

or not Rachel Meyer was, in fact, qualified on the basis of her application and her data sheet. Not only is this the only evidence in the case, it is substantial evidence and as such the court of appeals has erred when they declared the district court's judgment to be clearly erroneous in finding respondent was not qualified for the job of maintenanceman.

As stated so eloquently by the dissent at page 16 (A14) of the opinion below "it is not the function of the court of appeals to re-evaluate the evidence presented in trial court, and the reviewing court cannot substitute its judgment for the first hand evaluation." *St. Louis Typographical Society Union No. 8* v. *Harold Company,* 402 F.2d 553, 557 (8th Cir. 1968).

CONCLUSION

The Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals. As discussed, the court below failed to follow the opinions of the 5th and 8th circuits in *Pettway* and *Green, supra,* and has violated the opinions of this court set out in *International Brotherhood of Teamsters* and *McDonnell Douglas, supra.* The issues raised herein will have great impact on all employers throughout the country, and not only governmental agencies, but private employers as well. The holding by the court below, if not reversed, could result in employers being ordered to hire unqualified applicants, as this petitioner has been ordered by the court below to hire an unqualified applicant. Consequently, the matter should be determined by this court to serve as a guide to all employers and all courts in reviewing the actions of employers throughout the country.

Respectfully submitted,

BRUCE A. RING
Chief Counsel

JOHN H. GLADDEN
Assistant Counsel

CURTIS F. THOMPSON
Assistant Counsel

State Highway Building
Jefferson City, Missouri 65101
Attorneys for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-2040

Rachel J. Meyer,
Appellant,

v.

Missouri State Highway Commission, State of Missouri, and Paseo Bridge Commission,
Appellees.

Appeal From the United States District Court for the Western District of Missouri

Submitted: June 16, 1977
Filed: December 14, 1977

Before MATTHES, Senior Circuit Judge, BRIGHT, Circuit Judge, and MILLER, Judge.*

BRIGHT, Circuit Judge.

Rachel Meyer, a former employee of the Missouri State Highway Commission (the Commission), brought this action against her former employer under § 703(a) of Title VII,[1] the Civil Rights Act of 1964, alleging that the Commission discriminated against her because of her sex in

*The Honorable Jack R. Miller, Judge, U.S. Court of Customs and Patent Appeals, sitting by designation.

1. 42 U.S.C. § 2000e-2 (Supp. V 1975).

failing to promote her and in failing to consider her for relocation to another job when her job was terminated. The district court denied her any relief, and she brought this appeal. We affirm the district court in part, reverse in part, and remand the case for relief consistent with this opinion.

I.

Appellant Meyer (now Dominguez) worked full-time as a toll collector for appellee on the Paseo Bridge in Kansas City, Missouri, from May 1, 1970, to September 30, 1972, when the bridge became a free bridge.

Alfred Schumacher managed the Paseo Bridge during this period, and supervised appellant's work. Schumacher's duties included hiring and firing, recommending pay increases for the employees of the bridge, and promoting individuals to the position of shift captain. The job of shift captain was "unclassified" by the Commission and lacked any written description of duties or minimum qualifications for the job. The district court found that serving as shift captain entailed primary duties of (1) taking care of problems involving the paying public, (2) handling personal matters between toll collectors, and (3) supervising the automatic toll collecting machines. The trial court indicated that proper performance of these duties requires the ability to react well in crises and the ability to command respect from fellow employees.

Mr. Schumacher employed informal procedures in making promotions to shift captain. Because the job was unclassified, he was not required to post notices of job openings for shift captain and he did not do so. Thus, no formal application process existed. Instead, Schumacher summoned the chosen individual to his office and asked whether he wanted the promotion. The Personnel

and Accounting Offices of the Commission then made a pro forma review of the appointment.

During appellant's tenure at the bridge, one toll collector with greater seniority, Martin Cady, received a promotion to shift captain. At the time of his promotion, the Commission employed only males in the four shift captain positions available.

In anticipation of the close of the Paseo Bridge toll gates, the Commission issued a resolution stating "every effort" should be made to relocate the eighteen full-time employees of the Paseo Bridge in other jobs with the Commission. Frank Taggart, a personnel liaison officer for the Commission, undertook responsibility to coordinate these efforts. He assembled employment applications, data sheets, and performance appraisals, and mailed them out to each of the ten regional highway districts in Missouri under a cover letter directing that the various districts give employment preference, all other things being equal, to Paseo Bridge employees.[2] Mr. Taggart and manager Schumacher of the Paseo Bridge then coordinated interviews between eligible bridge employees and various district offices.

Appellant applied for relocation, listing on her application that she would take any job for which she was qualified, but expressing preferences for the Kansas City area and daytime hours. She listed no skills except for typing, and no prior experience except waitressing. She also mentioned to Mr. Taggart on several occasions that she could do "anything a man could do," and that she did not want her application limited to office or clerical work.

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2. The Commission, however, could not enforce this preference under existing highway department employment practices. Each district hired autonomously, and its appointments were rubber-stamped by the Commission's central office.

Sixteen of the eighteen eligible employees applied for relocation. Of this total, twelve were granted at least one interview, and ten received job offers. Four employees, including appellant, the only woman in the group, received no interviews.

Ms. Meyer then filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within the time limits prescribed by § 706 of Title VII, 42 U.S.C. § 2000e-5 (Supp. V 1975). The EEOC referred her charge to the Missouri Commission on Human Rights, which granted a waiver of jurisdiction to her on September 27, 1972. The EEOC mailed her a Notice of Right to Sue on August 27, 1973, and within ninety days, on November 26, 1973, she filed this action against appellee for injunctive relief and damages, including backpay and reinstatement.

In her suit and on this appeal, appellant claims that she suffered discrimination on the basis of sex in two ways: first, because she was not considered for promotion to shift captain during her tenure on the bridge; second, because she was not relocated to another job within the state highway department after the closing of the Paseo Bridge.

The district judge denied Ms. Meyer any recovery, finding on each claim that she had failed to establish a prima facie case of discrimination. She brought this appeal, contending that the district court findings were clearly erroneous.

II.

Recent decisions of the Supreme Court have greatly clarified the legal tests employed in determining whether or not a hiring practice is discriminatory under the appli-

cable provisions of Title VII.[3] The Court has recognized two separate theories under which plaintiffs may be entitled to relief under Title VII: (1) disparate treatment, and (2) disparate impact.[4] *International Brotherhood of Teamsters* v. *United States*, 97 S.Ct. 1843 (1977). *See also McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

In this action, Ms. Meyer proceeded on a disparate treatment theory. In order to prevail under this theory,

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3. Section 703 of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2 (Supp. V 1975), provides, in pertinent part, that:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

4. In *International Brotherhood of Teamsters* v. *United States*, 97 S.Ct. 1843, 1854-55 n.15 (1977), the Court declared:

> "Disparate treatment" such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate impact theory. Either theory may, of course, be applied to a particular set of facts. [Citations omtited.]

she must prove: (1) differences in treatment, and (2) a discriminatory motive on the part of her employer. *International Brotherhood of Teamsters* v. *United States, supra,* 97 S.Ct. at 1854 & n.15; *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 805 & n.18.

To meet this burden, Ms. Meyer must in the first instance establish a prima facie case of discrimination. *International Brotherhood of Teamsters* v. *United States, supra,* 97 S.Ct. at 1854; *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 (1975); *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 802. What constitutes a prima facie case of discrimination necessarily varies according to the facts of the case. *International Brotherhood of Teamsters* v. *United States, supra,* 97 S.Ct. at 1866; *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 802 n.13. In this case, both parties propose analysis under the four-part test of *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 802. *See also International Brotherhood of Teamsters* v. *United States, supra,* 97 S.Ct. at 1866; *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 772-73 (1976); *United States* v. *N. L. Industries, Inc.,* 479 F.2d 354 (8th Cir. 1973). To make out a prima facie case of discrimination under this test, the plaintiff must demonstrate that:

1) She is a member of a protected class;

2) She applied for and qualified for a job for which the employer was seeking applicants;

3) despite her qualifications she was rejected;

4) After her rejection, the position remained open and the employer continued to seek applications from persons with plaintiff's qualifications.

This showing of differences in treatment often implies discriminatory intent. *International Brotherhood of Teamsters* v. *United States, supra,* 97 S.Ct. at 1854 n.15; *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 266 (1977). As Mr. Justice Stevens has noted, "[f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor."[5]

Once plaintiff has successfully proven a prima facie case of discrimination, the burden of proof shifts to the defendant-employer to rebut this showing by demonstrating either that the plaintiff was not treated differently than other job applicants, or that any difference in treatment was not based on discriminatory motives.

In this case, appellant makes two claims that must be analytically distinguished: (1) that she was discriminated against because she was not given a chance to relocate to another job when the Paseo Bridge closed, and (2) that she was discriminated against because she was not promoted to the position of shift captain. As indicated above, the parties have proposed that the four-part test outlined in *McDonnell Douglas Corp.* v. *Green* be used to determine whether plaintiff has set out a prima facie case of sex discrimination. They contend, and we agree, that promotion and job relocation are sufficiently analogous to the initial hiring decision to warrant the use of this test.

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5. *Washington* v. *Davis,* 426 U.S. 229, 253 (1967) (Stevens, J., concurring). Mr. Justice Stevens continued:

> For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process.

We review each of plaintiff's claims separately below. In doing so, we are cognizant of the fact that we cannot overturn a district court's factual findings unless we find them clearly erroneous, Fed. R. Civ. P. 52(a), and we cannot make our own independent factual findings upon a record barren of facts. *Hazelwood School Dist.* v. *United States*, 97 S.Ct. 2736 (1977).

III.

We first address appellant's claim of discrimination in promotion to shift captain. The district court concluded appellant failed to make out a prima facie case of sex discrimination with respect to this claim. Although appellant vigorously contends that she was qualified for the position of shift captain, the district court found otherwise. To be sure, she performed her job satisfactorily or better, which indicates some basis for consideration for promotion to shift captain. The district court in its opinion notes, however, that appellant lacked respect from her co-workers and did not respond adequately in emergencies. This finding supports the district court's determination that appellant lacked the qualifications necessary to perform satisfactorily as a shift captain. Accordingly, here appellant failed to establish the second element of the *McDonnell* test for a prima facie case—job qualification. Therefore, we affirm the district court's ruling on this issue as not clearly erroneous.

IV.

We now turn to appellant's second claim, that she suffered discrimination in job relocation opportunities. Ms. Meyer contends that she applied and was qualified for several jobs for which male Paseo Bridge employees had received consideration, but that she did not receive consideration for any of them: 1) maintenanceman, 2) serviceman, 3) custodian, 4) hotel manager.[6] We need consider only the first job for which appellant claimed she was qualified. Our review of the record demonstrates that appellant successfully has made out a prima facie case of sex discrimination because she was not considered for the job of maintenanceman, that the Commission failed to rebut her showing and that the district court's finding to the contrary is clearly erroneous.

Of the four elements necessary to satisfy the *McDonnell Douglas* test, the parties contested only one, qualifications, in regard to the position of maintenanceman. The district court concluded that Ms. Meyer did not possess two qualifications for the job, the ability to operate light equipment such as pickups and mowers, and willingness to be on a 24-hour call. The district court stated:

> In view of the fact that plaintiff had no prior experience with handling equipment, as well as the fact that her application stated a preference for working daytime hours only, this Court cannot conclude that she was refused employment for positions which require operation of equipment and 24-hour call or night service solely on the basis of her sex. [Slip op. at 11.]

Although appellant's relocation application and her supplemental data sheet did not mention any ability to

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6. The fourth job, hotel manager ,is not a position with the Commission. Ms. Meyer contended that she was discriminated against because all male employees who had not yet found new jobs and were still seeking work received a letter from the Commission about a hotal manager job available with a private employer in Kansas City, but she did not. In effect, Ms. Meyer contends that the Commission should be liable under Title VII for discrimination in hiring, not for failing to hire her, but for failure to refer her to another employer. Because of our holding in this case, we do not reach this unusual claim.

operate lightweight mechanical equipment, we must observe that the data sheets called for general information. Ms. Meyer did state on her application that she possessed a driver's license and could obtain a chauffeur's license if necessary.

She stated as a conclusion on her form that "I would like to remain with the highway department. I would consider any type of work within my abilities. Prefer day hours * * * Please." Five other former Paseo Bridge employees, all males, received interviews for the job of maintenanceman despite the fact that they did not indicate an ability to operate light equipment on their personnel data sheet. Indeed, some did not even mention on their application or data sheet that they could drive.

The district court found that appellant lacked the second qualification for maintenanceman—a willingness to be on 24-hour call—noting that on her application for relocation she stated a preference for daytime work. However, Ms. Meyer stated only a *preference* for day hours and repeatedly told the Commission that she would like to be considered for the job of maintenanceman. Other Paseo Bridge employees stated *geographical preferences*, but were granted job interviews in districts outside of their preferences.

Although no Missouri state highway official with hiring authority testified for appellee, the trial court in rejecting Ms. Meyer's argument that she had presented a prima facie case of employment discrimination reasoned as follows:

> It is true, indeed, that others were hired for positions with the Highway Commission and that plaintiff was not, but aside from the testimony that all Paseo Bridge employees' applications were treated in the

same manner, no witness before this Court had knowledge of what specific consideration plaintiff received or whether those with hiring authority looked at her application objectively. In view of the fact that plaintiff had no prior experience with handling equipment, as well as the fact that her application stated a preference for working daytime hours only, this Court cannot conclude that she was refused employment for positions which require operation of equipment and 24-hour call or night service solely on the basis of her sex. In short, while we do not know that the hirers of 159 men in the Highway Commission looked at plaintiff's application objectively, without sexual bias, we cannot conclude from the evidence presented herein that they *failed* to look at plaintiff's application objectively. On the basis of this evidence, the most reasonable conclusion is that plaintiff, like the male employees who were not interviewed or relocated, was not interviewed for job openings because of the restrictions on her application form. [Slip op. at 11-12 (footnote omitted).]

We reject this reasoning. It is not based on an appropriate construction of the requirements for setting out a prima facie case. The court imposed on Ms. Meyer the burden to show that the Commission *failed* to look at her application objectively. This is a far greater burden of proof than required, for it entails proof of the subjective states of mind of each of the individuals with hiring authority in the Commission who failed to hire the plaintiff.

As we have already stated, the proper burden of proof includes a prima facie showing of differences in treatment and discriminatory intent. Ms. Meyer presented ample evidence establishing that she was qualified to serve as a maintenance worker.

Additionally, the statistical evidence shows that of the 2,000 employees of the Commission serving in the maintenance division at the time in question, none were females. During the relocation period, 159 men and no women were hired as new maintenancemen, and 10 of the 15 Paseo Bridge employees received interviews for the position, some with less evident qualifications than Ms. Meyer. This evidence not only indicates differences in treatment, it also raises a strong inference of discriminatory intent. For that reason, we hold as a matter of law that plaintiff has proven a prima facie case of sex discrimination with respect to hiring for the position of maintenanceman.

Against the statistical evidence indicative of purposive sex discrimination in hiring practices plus specific evidence of disparate treatment of Ms. Meyer's application as compared to male employees similarly situated, the Commission offered rebuttal evidence only on the issue of Ms. Meyer's lack of qualifications. Her case has pierced that shield, and the Commission has failed to rebut her prima facie showing of discrimination.

In sum, the record establishes that Ms. Meyer has made out an unrebutted prima facie case of sex discrimination in her claim that she was not considered for the job of maintenanceman, under relocation procedures of the Missouri Highway Department, notwithstanding that she was qualified for such position. The trial court applied an improper test in determining that Ms. Meyer failed to establish a prima facie case. But utilizing a proper evidentiary test, we conclude that the findings adverse to Ms. Meyer in this regard must be set aside as clearly erroneous.

Accordingly, we reverse and remand this case to the district court with directions to grant appellant back pay, attorneys' fees, and costs in the district court action, and

other appropriate relief in conformity with 42 U.S.C. § 2000e-5(g) (Supp. V 1975). We shall allow appellant costs as well as reasonable attorneys' fees on this appeal upon the filing of an appropriate affidavit supporting and detailing time spent upon this appeal. *Allen* v. *Amalgamated Transit Union Local 788*, 554 F.2d 876 (8th Cir. 1977); *Firefighters Institute for Racial Equality* v. *St. Louis*, 549 F.2d 506 (8th Cir. 1977).

MATTHES, Senior Circuit Judge, concurring in part and dissenting in part.

I agree with the majority opinion insofar as it affirms the district court's finding that plaintiff was not discriminated against with respect to shift captain promotion. I must respectfully dissent, however, from that portion of the opinion which holds that plaintiff established a prima facie case of sex discrimination regarding defendant's failure to employ her as a maintenanceman.

The dispositive issue in this litigation is whether or not plaintiff was qualified for the job of maintenanceman. Unless qualified for the position denied her, plaintiff cannot establish a prima facie case of sex discrimination under Title VII. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973); *Mosby* v. *Webster College*, No. 76-2064 (8th Cir., filed October 12, 1977). The district court found that plaintiff lacked the necessary qualifications. Her case must therefore fail unless she can demonstrate that that finding was clearly erroneous.

A district court's findings of fact will be disturbed as clearly erroneous only if "[s]uch evidentiary weight and convictional certainty [is] present that the appellate court does not feel able to escape the view that the trial court has failed to make a sound survey of or to accord the proper effect to all of the cogent facts . . . ." *Nee* v. *Lin-*

wood Securities Co., 174 F.2d 434, 437 (8th Cir. 1949). The burden of proving clear error is particularly heavy where, as here, the district court is experienced, capable, and even-handed. 5A MOORE'S FEDERAL PRACTICE ¶ 52.03, at 2627 (2d ed. 1977); *see Noland* v. *Buffalo Ins. Co.*, 181 F.2d 735, 739 (8th Cir. 1950).

The district court found that plaintiff was unqualified to be a maintenanceman because she lacked apparent experience with light equipment and because she had a stated preference for daytime work. Plaintiff also had a geographical preference. The majority opinion correctly points out that several male Paseo Bridge employees were interviewed for the job of maintenanceman despite either a geographical preference or a lack of apparent experience with light equipment. But only plaintiff indicated a preference for daytime hours. That preference directly conflicted with the requirement that a maintenanceman be on call twenty-four hours a day. On that basis alone, the district court could properly find that plaintiff lacked the qualifications necessary for the position she sought.

It is not enough that we might have found the facts differently for "[i]t is not the function of the court of appeals to reevaluate evidence presented in the trial court, and the reviewing court cannot substitute its judgment for first hand evaluation." *St. Louis Typographical Society Union No. 8* v. *Herald Co.*, 402 F.2d 553, 557 (8th Cir. 1968). As Judge John B. Sanborn, a distinguished jurist, put the matter:

> This Court, upon review will not retry issues of fact . . . . The power of a trial court to decide doubtful issues of fact is not limited to deciding them correctly. . . . In a nonjury case, this court may not set aside a finding of fact of a trial court unless there is no substantial evidence to sustain it, unless it is

> against the clear weight of the evidence, or unless it was induced by an erroneous view of the law. (citations omitted).

Cleo Syrup Corp. v. *Coca Cola Co.*, 139 F.2d 416, 417-18 (8th Cir 1943), *cert. denied*, 321 U.S. 781 (1944); *see also Kendrick* v. *Com'n. of Zoological Subdistrict*, No. 76-2120 (8th Cir., filed November 14, 1977) (Title VII case).

Plaintiff simply has not met her burden of demonstrating that the district court's finding that she was not qualified to be a maintenanceman was clearly erroneous. Consequently, I am compelled to hold that plaintiff failed to establish a prima facie case of sex discrimination.

I must also disagree with the majority's position that the district court required plaintiff to adduce a greater quantum of proof than that required in a Title VII case. In my view, the language of the district court's opinion to which the majority objects, *slip op.* at 12, is taken completely out of context. Even so, the district court's formation does not indicate the imposition of an undue burden of proof on the plaintiff. That section does not differ materially from those other portions of the district court's opinion which discuss the plaintiff's burden. What differences exist are purely semantical. When read as a whole, the district court's opinion clearly demonstrates a proper regard by an able trial judge for the plaintiff's burden of proof.

Neither am I persuaded that the majority's assessment and evaluation of the statistical evidence is correct. Although such evidence, under proper circumstances, is entitled to appropriate consideration, it did not in this case, as the majority holds, *slip op.* at 13, establish a prima facie case of discrimination as a matter of law. The statistical evidence shows that no females were employed by defendant as maintenancemen, but there was no evidence

concerning the number of females who sought the position. Without such a comparative measure, the statistical evidence cited by the majority is, at best, inconclusive. *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 231 n.46 (5th Cir. 1974); *see Green* v. *Missouri Pacific Railroad Co.*, 523 F.2d 1290, 1295 (8th Cir. 1975). If the record revealed that other women besides plaintiff were denied employment as maintenancemen, then a proper statistical inference of disparate treatment might be drawn.

Finally, and in summary, the majority opinion, viewed in the light of the entire record, is internally inconsistent. The evidence relating to plaintiff's claim that she was not promoted to toll captain solely because of her sex is just as cogent and probative, if not more so, than the evidence in support of her contention that her sex was the sole motivation for denying her a job as a maintenanceman. As I read the record, plaintiff was familiar with all segments of the tool collecting operation on Paseo Bridge, including the duties of toll captain, yet Alfred Schumacher, who supervised and managed the Paseo Bridge, did not promote plaintiff to the position of toll captain. However, the district court found, in effect, and properly so, that plaintiff's gender was not a factor in Schumacher's decision.

It seems only logical to conclude that the job of maintenanceman involves duties which are far more arduous than those which a toll captain is required to perform. The record bears out this conclusion. Frank Taggert, Personnel Liaison Officer for the Highway Commission, testified that a maintenanceman was subject to be on call twenty-four hours a day. He carefully considered plaintiff's transfer application, and it is clear that, after a close appraisal of plaintiff's qualifications and her stated preference for day hours only, he concluded that she was not

qualified for the position of maintenanceman. It was on that basis, and that basis alone, that she was not employed. In particular, he stated that he did not give plaintiff's application, her performance record, and her data sheet any different treatment than that accorded the male applicants who were seeking relocation.[1]

On the basis of all of the evidence, the district court made the following finding:

> With full awareness of the difficulty of proving sex discrimination even though it may in fact exist, the Court has very carefully examined all of plaintiff's contentions and the evidence with sensitivity for any such possible bias. Having given full consideration to plaintiff's arguments and plaintiff's evidence, however, the Court found her claims of discrimination on the basis of sex and promotions and relocation unsupported by the record. Plaintiff has failed to present a prima facie case of discrimination, and the burden of proof accordingly has not shifted to defendant to set forth a nondiscriminatory reason why plaintiff was neither promoted nor relocated upon closing of the bridge. *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). The Court does note in addition, however, that defendant has set forth competent evidence to explain the circumstances of plaintiff's employment situation.

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1. Mr. Schumacher, plaintiff's immediate supervisor, did not testify during the trial. The record discloses that the attorney representing the Highway Commission made a conscientious effort to locate Mr. Schumacher, but was unable to do so. Apparently, Mr. Schumacher had suffered from some illness after the toll collecting process on Paseo Bridge had been terminated. However, Taggert testified to conversations he had with Schumacher and stated positively that Schumacher at no time demonstrated any bias or prejudice toward plaintiff because she was a female.

Considering the entire record, I am not "left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Accordingly, I would affirm the judgment.

ADDENDUM TO DISSENT

The concluding paragraph of Judge Bright's original opinion read as follows:

> Accordingly, we reverse and remand this case to the district court with directions to grant appellant appropriate relief in conformity with 42 U.S.C. § 2000e-5(g) (Supp. V 1975). We shall allow appellant costs as well as reasonable attorneys' fees on this appeal upon the filing of an appropriate affidavit supporting and detailing time spent upon this appeal. (citations omitted.)

Judge Bright has now revised the foregoing paragraph to read:

> Accordingly, we reverse and remand this case to the district court with directions to grant appellant back pay, attorneys' fees, and costs in the district court action, and other appropriate relief in conformity with 42 U.S.C. § 2000e-5(g) (Supp. V 1975). We shall allow appellant costs as well as reasonable attorneys' fees on this appeal upon the filing of an appropriate affidavit supporting and detailing time spent upon this appeal. (citations omitted.)

Thus, it will be seen that the opinion has been modified to require the district court to grant the appellant back pay, attorneys' fees, and costs in the district court action. I am particularly disturbed by this very material change,

and it is my firm belief that any relief granted appellant by the district court should be prospective only. It occurs to me that the district court will be required to engage in speculation if it is compelled to grant appellant back pay. This is so because there is nothing in the record to show that if appellant had been offered a job as maintenanceman that she would have accepted what was offered her. Neither is there any evidence in the record to show the period of time appellant might have continued working for the Commission in any position that she might have accepted. Under these circumstances, I fail to understand what criteria or guidelines the district court may use in attempting to arrive at an appropriate amount to which appellant is entitled as back pay. Before any such award is made, I would hope that the district judge would fully explore the questions that I pose in this addendum to my dissent. Appellant is certainly not entitled to back pay which would in effect constitute a windfall for her. Of course, I continue to adhere to my position that she is not entitled to any relief.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI,
WESTERN DIVISION

NO. 73 CV 627 W-4

RACHEL J. MEYER,
Plaintiff,

vs.

MISSOURI STATE HIGHWAY COMMISSION,
Defendant.

FINDINGS AND OPINION

(Filed October 26, 1976)

This action is brought under the Equal Employment Opportunity Act, as it amends the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Plaintiff, a white female, who was employed from April 1970 to September 1972 as a toll collector on the Paseo Bridge at Kansas City, Missouri, alleges that she was discriminated against on the basis of sex in being passed over for promotions and in being denied opportunities for relocation in other jobs within the State Highway Commission upon closing of the Paseo Bridge.

Defendant, Missouri State Highway Commission, is an agency of the State of Missouri, charged with employment and supervision of employees who worked on the Paseo Bridge. During all of the time that Rachel Meyer worked as a toll collector on the Paseo Bridge, she was an employee of the Missouri State Highway Commission, under the immediate supervision of Alfred Schumacher, manager of the Bridge and also an employee of the Missouri State Highway Commission. Defendant is an "em-

ployer" engaged in interstate commerce and is subject to provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

Federal jurisdiction is invoked pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 2000e-5. Plaintiff filed her charge of discrimination with the Equal Employment Opportunity Commission on September 18, 1972, within the time limitations prescribed by §§ 706(b) and (d) of Title VII. Following referral of her charge to the Missouri Commission on Human Rights, from which a waiver of jurisdiction was received on September 27, 1972, a Notice of Right to Sue was mailed to plaintiff from the Equal Employment Opportunity Commission on August 27, 1973. Within ninety days of that date, on November 26, 1973, plaintiff filed this action for injunctive relief and damages, including back pay and reinstatement, against the defendant, Missouri State Highway Commission.

A full trial de novo to the Court commenced on August 30, 1976. At the trial, plaintiff and defendant adduced evidence in support of their respective contentions; both parties filed a joint stipulation of facts and following the trial submitted their respective proposed findings of fact. The issues of fact and law have been fully briefed and argued to the Court by each party to this action. Having heard the evidence in this case, and reviewed the pleadings and files submitted herein, the Court now renders the following findings of fact.

Plaintiff was a full-time toll collector on the Paseo Bridge from May 1, 1970, to September 30, 1972, under the supervision of the manager of the Bridge, Alfred Schumacher. Schumacher hired, fired, made promotions and recommended pay increases for employees on the Paseo Bridge. These actions were approved by the Director of

the Accounting Division in Jefferson City, Missouri; as long as all salary increases were within the ranges set by the Highway Commission, Schumacher's recommendations were approved as a matter of course.

The Highway Commission has compiled a Personnel Management Manual which outlines Policy or Procedure No. 1017, requiring performance appraisals for all salaried employees to be made annually by the immediate supervisor. Although Alfred Schumacher was furnished with a copy of the Personnel Management Manual, he was not monitored as to whether he followed the procedures set forth therein, and he did not comply with Procedure No. 1017. No written job performance appraisals were prepared with respect to performance of employees on the Paseo Bridge until May 1972, in anticipation of the closing of the Bridge. Under the Highway Commission classification of jobs, however, the Paseo Bridge jobs were "unclassified," and thus exempt from requirements for hiring and promotion set forth in the Highway Commission's Personnel Management Manual. While those procedures were available as "guidelines" for use in unclassified job situations, adherence to the procedures was not mandatory.

The parties have stipulated that during the time plaintiff was employed as a toll collector on the Paseo Bridge, she performed all of her assigned duties in a satisfactory or above satisfactory manner. During the time of her employment on the Bridge, plaintiff was not promoted to the position of shift captain, although that promotion was given to one Martin Cady, a male with greater seniority than plaintiff, on March 1, 1972. During the period in which the Missouri State Highway Commission administered the Paseo Bridge, there were no job descriptions for the position of shift captain; the duties of shift captains

and promotions to that position were the responsibility of Alfred Schumacher. Job duties of shift captains were taking care of any problems involving the paying public, handling personal matters between toll collectors, and supervising the automatic toll collecting machines. Inherent in these duties were requirements of respect from fellow employees, and the ability to react well in emergencies. Shift captains on the Paseo Bridge were not responsible for electrical work on automatic toll collecting machines, although general operating knowledge of the machines was required. All persons employed by the Missouri State Highway Commission on the Paseo Bridge who held supervisory positions or had supervisory authority over toll collectors during the period of plaintiff's employment were males.

The toll booths on the Paseo Bridge closed on October 1, 1972, when toll collections on the bridge ceased. In anticipation of the closing of the toll gates, the Missouri State Highway Commission approved the recommendation of the Director of Highways that every effort be made to absorb the 18 full-time employees hired prior to June 1, 1970, at the Paseo Bridge into another division or district of the Highway Commission. Resumes for each of the 18 employees were to be compiled and submitted to the various divisions and districts, with instructions to give preference to these employees when hiring for jobs commensurate with their qualifications.

At the close of the Paseo Bridge, no performance appraisals were prepared by Alfred Schumacher, although job applications and data sheets were prepared by the 18 full-time employees. In May 1972, Mr. Frank Taggart, Personnel Liaison Officer for the Highway Commission, traveled to Kansas City, Missouri, to assist Alfred Schumacher in preparing job performance appraisals of the

full-time Bridge employees. Mr. Taggart advised Schumacher of the purpose of the appraisals and explained the various categories listed in the appraisal forms. As the two discussed the job performance of each individual employee, Taggart took handwritten notes, from which he completed the job performance appraisals for the Bridge employees upon his return to Jefferson City.

Application forms and data sheets furnished to the Bridge employees to be completed by those interested in job transfers or relocation were to be completed and returned to the Personnel Division of the Highway Commission no later than May 12, 1972. Plaintiff, the only female among the 18 employees who applied for job relocations with the Highway Commission, completed her application, stating therein that she would "prefer day hours please."

Attempting to transfer and relocate employees at the Paseo Bridge, Schumacher arranged for some employees to have personal interviews with agents of the Highway Commission who had hiring authority. Plaintiff was not interviewed by the Highway Commission. Plaintiff never was contacted for an interview by any district or division of the Highway Commission. While employees of the Highway Commission are on temporary transfer from one district to another, or when an employee is asked by another district to travel to that district to interview for a position, it is the practice of the department to furnish a Missouri State Highway Commission automobile to that employee for transportation, because the interview is considered to be within the scope of the interviewee's employment. Because Rachel Meyer was not requested to interview at another district, a state car was not put at her disposal; at her own expense, plaintiff traveled to Jefferson City to inquire of job openings or possible relocations or transfers.

Plaintiff also contacted Frank Taggart by telephone to inquire about the status of her application for relocation. In response, Taggart informed her that although very few positions were available, there was some hiring for the position of maintenance man. Upon plaintiff's inquiry whether she could be considered for that position, Taggart informed her that the job duties for maintenance men included heavy lifting, operation of light equipment such as tractors and mowers, and 24-hour call.

The job specification now utilized for the position of maintenance man indicates under "education and experience required" the completion of eighth grade and qualification to operate light equipment such as trucks and tractor mowers. Although the job tasks performed by various maintenance men vary from job to job, the Missouri State Highway Commission requires that individuals employed as maintenance men be capable of performing all of the functions set out in the job specifications.

Plaintiff repeatedly expressed to officials of the Highway Commission that she did not wish her application confined to office or light duty work, and insisted that she could "do anything a man could do." Plaintiff never was given a weight lifting test; no weight lifting requirements ever have been established by the Highway Commission in its job specification for the position of maintenance man. Plaintiff was not offered a position as maintenance man on a trial basis to determine her ability to handle the work.

On July 24, 1972, Frank Taggart contacted Alfred Schumacher, instructing him to check with the eligible employees on the Paseo Bridge to ascertain whether any of them would be interested in a job opening in Maintenance and Traffic in District 6. On July 31, 1972, Schumacher reported that he had contacted everyone and that

no one was interested in the District 6 position at that time. Between June 1, 1972, and December 31, 1972, a total of 159 males and no females were hired to fill positions as maintenance men with the Missouri State Highway Commission. Between April 1, 1972, and December 31, 1972, approximately 250 or more employees were hired by the Highway Commission in addition to the male employees from the Paseo Bridge who were transferred or relocated to other positions. Plaintiff was not interviewed for any of these openings.

Loren Blackwell, a toll collector on the Paseo Bridge who stated on his application for relocation that he preferred to stay in District 4, the Kansas City area, was not interviewed for other jobs at the closing of the Paseo Bridge.[1] Raymond Love, a toll collector on the Paseo Bridge who indicated on his application that he was not interested in work at locations other than Kansas City, was not interviewed or offered other employment at the close of the Paseo Bridge. Jimmy Calvin, a toll collector at the Paseo Bridge whose possible heart condition was indicated on his application for relocation and job performance appraisal, was not offered further employment on closing of the Paseo Bridge. Andy Isom, who was believed to have a slight arthritic condition, was offered the position of maintenance man in Gainesville, Missouri, on a temporary basis, to determine his ability to perform his job duties; after one month trial, Andy Isom was permanently transferred to the position of maintenance man. John Hay was not interviewed for maintenance or building custodian in accordance with specialities listed on his application and job performance appraisal. Johnney Sherrell, a toll collector

1. Ironically, plaintiff contends that Blackwell "was not interviewed because of the bad and critical job performance appraisal he was given by Alfred Schumacher." (Plaintiff's Proposed Ultimate Findings of Fact, p. 6.)

on the Paseo Bridge who applied for relocation as a driver or in a service position, was interviewed and hired as a maintenance man in District 4.

The question now before the Court is whether, on the facts as stated above, plaintiff was denied job opportunities and promotion at the Paseo Bridge, and job relocation at the close of the Paseo Bridge, because of her sex. On the facts presented in the files and records herein, as well as in the trial of this cause, the Court concludes that plaintiff has failed in her burden of proving that she was discriminated against on the basis of her sex. While there was no specific evidence in this case to indicate that plaintiff's sex was *not* the reason that plaintiff was not promoted or relocated, neither was there evidence to indicate that she was denied promotion or relocation on that basis.

With respect to promotions on the Paseo Bridge, Alfred Schumacher enjoyed absolute authority, within specified salary ranges, to promote the most qualified person to the position of shift captain. Because Schumacher was not a witness at the trial, only circumstantial evidence is available to reveal any sexual bias on his part in failing to promote plaintiff. While it is true that plaintiff did not receive a promotion to shift captain, the weight of the credible evidence indicates that Schumacher made no derogatory comments in evaluating plaintiff, nor did he reveal a bias against women in general or any personal animosity toward plaintiff. Indeed, although plaintiff's performance appraisal includes Schumacher's evaluation that she may tend to be "scatterbrained in emergencies," which evaluation was supported by examples in Schumacher's discussion with Frank Taggart, plaintiff generally received good ratings from Schumacher, including his appraisal that she was honest, courteous, and performed the tasks assigned to her.

In addition to the absence of evidence of bias in Schumacher's appraisal of plaintiff, there was evidence that among her co-workers plaintiff was in some respects a controversial figure on the Paseo Bridge. In addition to the ability to handle emergencies, a talent already found lacking in plaintiff by her supervisor, the position of shift captain requires the respect of co-workers. Testimony concerning plaintiff's poor relationship with some of her co-workers, therefore, makes it impossible to determine that Schumacher's failure to promote plaintiff was based solely on the fact that she is female.[1] In short, while the Court could speculate that plaintiff was refused promotion because of her sex, it could just as easily conclude from the evidence presented that plaintiff was denied promotion because she lacked qualities which were possessed by others who did receive promotions.[2] In addition, the Court notes that although plaintiff contends seniority was not a major factor in promotions to shift captain, those who were promoted to that position possessed greater seniority than plaintiff.

Plaintiff similarly has failed to demonstrate that she was denied relocation on the basis of sex. Because no one with hiring authority in the Missouri State Highway Commission was a witness in the trial of this cause, the Court at best can only speculate as to the reason that plaintiff was not offered other employment with the Commission.

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1. Plaintiff correctly asserts that her evaluation, not based upon an objective performance appraisal, was dependent upon her supervisor's subjective appraisal. That fact alone, however, is insufficient to support a conclusion that Schumacher's appraisal was sexually biased or that the Highway Commission's promotion system fostered sexual stereotyping.

2. Plaintiff's reliance upon Rowe v. General Motors Corp., 457 F. 2d 348 (5th Cir. 1972), and Watkins v. Scott Paper Co., 530 F. 2d 1159 (5th Cir. 1976), is inapposite where, as here, plaintiff has failed to make a prima facie case of discrimination and is unaided by undisputed evidence of historical discrimination along the lines of race.

What is clear from the evidence, however, is that plaintiff's application and job appraisal form, like those of all other Paseo Bridge employees, was sent to the district engineers with instructions to disperse it to department heads. The same procedure was followed for all job applicants; Paseo Bridge employees were treated as a group, and plaintiff's application was treated no differently than those of her co-workers. It was not, and is not today, the practice of the Highway Commission to interview all applicants for available positions. While there was a stated preference that Paseo Bridge employees should be hired where qualified, that policy was a recommendation only and was not mandatory.

It is true, indeed, that others were hired for positions with the Highway Commission and that plaintiff was not, but aside from the testimony that all Paseo Bridge employees' applications were treated in the same manner, no witness before this Court had knowledge of what specific consideration plaintiff received or whether those with hiring authority looked at her application objectively. In view of the fact that plaintiff had no prior experience with handling equipment, as well as the fact that her application stated a preference for working daytime hours only, this Court cannot conclude that she was refused employment for positions which require operation of equipment and 24-hour call or night service solely on the basis of her sex. In short, while we do not know that the hirers of 159 men in the Highway Commission looked at plaintiff's application objectively, without sexual bias, we cannot conclude from the evidence presented herein that they *failed* to look at plaintiff's application objectively.[1] On the

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1. Although plaintiff now contends that she was qualified for the position of building custodian, that position requires regular evening work hours, contrary to the notation handwritten onto plaintiff's relocation application.

basis of this evidence, the most reasonable conclusion is that plaintiff, like the male employees who were not interviewed or relocated, was not interviewed for job openings because of the restrictions on her application form.

With full awareness of the difficulty of proving sex discrimination even though it may in fact exist, the Court has very carefully examined all of plaintiff's contentions and the evidence with sensitivity for any such possible bias. Having given full consideration to plaintiff's arguments and plaintiff's evidence, however, the Court has found her claims of discrimination on the basis of sex in promotions and relocations unsupported by the record. Plaintiff has failed to present a prima facie case of discrimination, and the burden of proof accordingly has not shifted to defendant to set forth a non-discriminatory reason why plaintiff was neither promoted nor relocated upon closing of the Bridge. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Court does note in addition, however, that defendant has set forth competent evidence to explain the circumstances of plaintiff's employment situation.[1]

For the above reasons, therefore, the Court finds the issues against plaintiff and in favor of defendant. Plaintiff is not entitled to any of the relief she seeks in this action, and judgment is ordered accordingly.

/s/ Elmo B. Hunter
Judge

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1. In accordance with the job specification for the position of maintenance man, defendant's witnesses testified that plaintiff was not qualified for that position. (While the Court concurs in that judgment in this instance, it would nevertheless appear appropriate that defendant consider devising a more sexually neutral job title.)

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1277

RACHEL J. MEYER,
Respondent,

vs.

MISSOURI STATE HIGHWAY COMMISSION,
Petitioner.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRUCE A. RING
Chief Counsel

JOHN H. GLADDEN
Assistant Counsel

CURTIS F. THOMPSON
Assistant Counsel

State Highway Building
Jefferson City, Missouri 65101
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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Additional Reasons for Granting Writ—

The decision below conflicts with controlling opinions of this court and the Second Circuit Court of Appeals as presented in *Townsend* v. *Nassau County Medical Center*, 558 F. 2d 117 (2nd Cir. 1977), cert. denied (No. 77-718) 2

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OCTOBER TERM, 1977

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AUTHORIZATION FOR SUPPLEMENTAL BRIEF

Supreme Court Rule 24(5) provides:

> "Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of his last filing."

In accordance with this rule, petitioner respectfully submits the following supplemental brief to its petition for writ of certiorari filed on March 13, 1978.

ADDITIONAL REASONS FOR GRANTING WRIT

The decision below conflicts with controlling opinions of this court and the Second Circuit Court of Appeals as presented in Townsend v. Nassau County Medical Center, 558 F. 2d 117 (2nd Cir. 1977), cert. denied (No. 77-718).

This court has recently had the opportunity to review a decision by the Second Circuit reversing a district court holding of discrimination based upon statistical evidence and chose not to grant certiorari to review the decision of the Second Circuit. The decision of the Second Circuit is *Townsend* v. *Nassau County Medical Center*, 558 F. 2d 117 (2nd Cir. 1977). The facts of that case are analogous to the case below from which this petitioner seeks review. In the *Townsend* case a black female employee instituted action against her employer, alleging racial discrimination. The plaintiff had been employed as a laboratory technician when the employer, a county, changed the job classifications and adopted new prerequisites for employment. The county required that individuals in the job position of plaintiff pass an examination which could only be taken by people with a college degree in science. Although plaintiff did not have a degree, she was allowed to take the examination under a "grandfather clause." She did not pass the examination, her employment was terminated, and she was rehired in a lower paying position. Thereafter, the employee brought suit for back pay, alleging that the college degree requirement was a violation of Title VII of the Civil Rights Act because that requirement had a disproportional racial impact insofar as far fewer blacks had college degrees than whites in the general population. The district court found that the plaintiff made a prima facie case by the statistical evidence of disparity in education between whites and blacks in the general population, and that there was no evidence which indicated a college degree was necessary for the position from which plaintiff had been dismissed. *Townsend*, supra, at 117-119.

The court of appeals reversed the district court by concluding that the plaintiff had not established a prima facie case based upon statistics of the general population. No evidence was presented of intentional discrimination by the defendant county or defendant medical center, and the court stated "(t)hat statistical evidence concerning only the general population is (not) sufficient to demonstrate that a job prerequisite 'operates to exclude' minorities." What must be shown is that virtually no member of the minority could qualify for the position because of the job prerequisites. *Townsend*, supra at 120. The appellate court reversed the district court and directed that the complaint be dismissed. *Townsend*, supra at 122. This court refused to grant plaintiff's petition for writ of certiorari. (Slip Decision No. 77-718)

The facts in the *Townsend* case are strikingly similar to the facts in the instant case. The opinion below is based upon the statistical evidence presented which compared the number of men hired for the position of maintenanceman to the entire population. This was the evidence as explained in the petition for writ of certiorari previously filed upon which the appellate court reversed the district court's findings of fact. There was no evidence that the State Highway Commission intentionally discriminated against the plaintiff-respondent. The decision below is directly contrary to the decision in the *Townsend* case, supra, a Second Circuit case; therefore, a conflict exists between the Eighth Circuit and the Second Circuit and petitioner respectfully requests that this court grant the

petition for a writ of certiorari in order to resolve this conflict.

Within the Second Circuit decision in *Townsend*, supra, a reference is made to a decision of this court. In *Washington* v. *Davis*, 426 U.S. 229 (1976), this court reversed the Appeals Court for the District of Columbia, which had, in turn, reversed the district court that had tried the case. The district court case involved the question of whether an employment test was illegally discriminatory. The trial court determined that although the test resulted in more blacks failing than whites, it was not illegally discriminatory because it was reasonably and directly related to job requirements. The appellate court reversed the district court on the basis that intent of the defendant was irrelevant, and that the discriminatory impact was controlling. The Supreme Court reversed the appellate court and reinstated the trial court's finding. *Washington*, supra at 603-614. Petitioner respectfully suggests that this court in the instant case should likewise reverse the opinion of the court below and reinstate the district court's findings, in order that the final decision in this case be consistent with the decision in *Washington* v. *Davis*, supra.

Respectfully submitted,

BRUCE A. RING
Chief Counsel

JOHN H. GLADDEN
Assistant Counsel

CURTIS F. THOMPSON
Assistant Counsel

State Highway Building
Jefferson City, Missouri 65101
Attorneys for Petitioner